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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 1415

October Term, 1969

NOT PRINTED

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,
Petitioner

v.

EX PARTE LEPORT WALTON,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. ------

October Term, 1969

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,
Petitioner

v.

EX PARTE LEPORT WALTON,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on January 20, 1970.

OPINION BELOW

The opinion delivered in the court below is not yet officially reported, but is appended to this Petition as Appendix "A." A Stay of Mandate was granted by the United States Court of Appeals to and including May 13, 1970.

JURISDICTION

As indicated above, the judgment of the Court of Appeals below was entered on January 20, 1970. A copy

of this judgment is attached hereto as Appendix "B." The jurisdiction of this court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

May a federal court properly, in rendering its decision in a state habeas corpus case, adopt a construction of a state statute opposite to the construction placed on the statute by the highest court of the state?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article IV., Section 4 of the Constitution of the United States provides:

> "Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government . . ."

The statutes involved are:

Article 1256. (1140) (710) (605) "Murder"

Whoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offense the negligent homicide or which excuse or justify the killing. O.C. 607; Act Feb. 12, 1858; Acts 1913, p. 238; Acts 1927, 40th Leg., p. 412, ch. 274, § 1.

Art. 1257. (1141) (711) (606) Punishment for murder

The punishment for murder shall be death or confinement in the penitentiary for life or for any term

of years not less than two. O.C. 607; Act Feb. 12, 1858; Acts 1913, p. 238; Acts 1927, 40th Leg., p. 412, ch. 274, § 1.

Art. 1257a. Evidence

In all prosecutions for felonious homicide the State or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the homicide, which may be considered by the jury in determining the punishment to be assessed. Provided, however, that in all convictions under this Act and where the punishment assessed by the jury does not exceed five years, the defendant shall have the benefits of the suspended sentence act. Acts 1927, 40th Leg., p. 412, ch. 274, § 2.

Art. 1257b. Instructions

In all cases tried under the provisions of this Act, it shall be the duty of the court to define "malice aforethought" and shall apply that term by appropriate charge to the facts in the case and shall instruct the jury that unless from all the facts and circumstances in evidence the jury believes the defendant was prompted and acted with his malice aforethought, they cannot assess the punishment at a period longer than five years; provided, however, that no offense committed prior to the taking effect of Chapter 274 of the General Laws of the 40th Legislature of 1927, shall be affected hereby whether an indictment has been re-

turned or not, but in every such case the offender may be proceeded against and punished under the law as it existed prior to the taking effect of said act, the same as if said act had not been passed. Acts 1927, 40th Leg., p. 412, ch. 274, § 3a; Acts 1927, 40th Leg., 1st C.S., p. 18, ch. 8, § 1.

STATEMENT OF THE CASE

Respondent was indicted in 1962 for murder, the indictment charging that the murder was committed with malice aforethought. Upon conviction of murder without malice in 1964, the jury assessed a punishment of five (5) years, from which the Respondent appealed. On February 17, 1965, the Texas Court of Criminal Appeals in Cause No. 37-673, 386 S.W.2d 805, reversed the trial court for errors committed during the trial. As a result the Respondent was again placed on trial and on July 27, 1965, was found guilty of murder with malice and received a sentence of fifty (50) years confinement in the State penitentiary. This conviction was appealed and the Court of Criminal Appeals on January 5, 1966, affirmed Respondent's conviction. See 398 S.W.2d 555.

On December 14, 1967, the Seventh Judicial District Court of Smith County, Texas, considered a Petition for Writ of Habeas Corpus and entered an Order setting forth the Court's Findings of Fact and Conclusions of Law and denying said application without an evidentiary hearing. On September 10, 1968, the same court once again entered an order denying a second Application for Writ of Habeas Corpus, without an evidentiary hearing.

The Application for Writ of Habeas Corpus was

made returnable to the Texas Court of Criminal Appeals, and was denied without order by the Texas Court of Criminal Apepals on November 15, 1968.

In December of 1968, Respondent then filed an Application for Writ of Habeas Corpus in the United States District Court for the Southern District of Texas, Houston Division, in Cause No. 68-H-1042. Pursuant to Public Law 89-590, 89th Congress, S. 3576, approved September 19, 1966, this cause was transferred to the United States District Court for the Eastern District of Texas, Tyler Division, and was denied by that court on June 5, 1969. (R. 9).

The United States Court of Appeals for the Fifth Circuit reversed the district court below and remanded for further proceedings not inconsistent with the rule announced in *Galloway v. Beto,* — F.2d —, presently before the United States Court of Appeals for the Fifth Circuit on Motion for Rehearing En Banc, (No. 27,461), a copy of said opinion being attached as Appendix "C."

REASONS FOR GRANTING THE WRIT

It is fundamental that Federal Courts ordinarily are without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state. *U.S. v. Burnison,* 70 S.Ct. 503, 339 U.S. 87, 94 L.Ed. 675; *Qong Ham Wah Co. v. Industrial Accident Commission,* 255 U.S. 445, 41 S.Ct. 373, 65 L.Ed. 723 and cases cited therein; *Akins v. Texas,* 65 S.Ct. 1276, 325 U.S. 398, 89 L.Ed. 1692 reh.den. 66 S.Ct. 86, 326 U.S. 806, 90 L.Ed. 491.

In *Galloway v. Beto,* (See Appendix "C") the United States Court of Appeals for the Fifth Circuit said:

"There can be little doubt that murder with malice and murder without malice *are separate and distinct offenses* under Texas law." (Emphasis ours). It had to decide the *Galloway* case and the present case on the "two distinct offenses" theory in order to apply the double jeopardy provisions of the United States Constitution.

Texas, being a state, is permitted to define its crimes. For almost half a century Texas courts have defined murder as one crime with two different ranges of punishment dependent upon a jury finding of fact with regard to malice.

Title 15 of the Texas Penal Code (1925) relates to offenses against the person, Chapter 15 of said Title 15 which related to manslaughter—was repealed by Act of the 40th Legislature in 1927. Acts 40th Leg., p. 412, ch. 274, Sec. 3. See Appendix "D."

Manslaughter was defined in Art. 1244 of said Title and Chapter as voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither excused nor justified.

Sec. 1 of the 1927 Act amended Arts. 1256 and 1257 of Chapter 16, eliminating malice aforethought from the definition of murder and reducing the minimum punishment from five (5) years to two (2) years.

Sec. 2 of said 1927 Act enacted Art. 1257-a which relates to evidence which the state or the defendant may offer "in all prosecutions for felonious homicide."

In addition to repealing Chapter 15, Title 15 relating to manslaughter and all other laws in conflict with the Act, Sec. 3 of the 1927 Statute repealed Chapter 18

of Title 15 of the 1925 Code which contained general instructions relating to homicide.

Sec. 3-a of the 1927 Act reads as follows:

> "In all cases tried under the provisions of this Act, it shall be the duty of the Court to define 'malice aforethought' and shall apply that term by appropriate charge to the facts in the case and shall instruct the Jury that unless from all the facts and circumstances in evidence the Jury believes the Defendant was prompted and acted with his malice aforethought, they cannot assess the punishment at a period longer than five years."

This portion of the 1927 Act was amended at a Special Session of the 40th Legislature by addition of a savings clause (Acts 40th Leg., 1st C.S., p. 18, Ch. 8) and has been designated by Vernon as Art. 1257-b, V.A.P.C.

The Caption of the 1927 Act reads:

> "An Act amending Articles 1256 and 1257 of the Penal Code of 1925, so as to properly define murder, and fixing the punishment for murder; inserting in the Penal Code a new article numbered 1257-a relating to what may be proved, and considered by the jury, in determining the punishment to be assessed for murder; repealing Chapter 15 of Title 15 of the Penal Code of 1925, relating to manslaughter, and all other laws in conflict with this Act, repealing Chapter 18 of Title 15 of the Penal Code of 1925; and declaring an emergency."

It is interesting to note that the Caption gives no notice of the enactment of a statute or notice that the provision of Section 3-a was to be enacted as a statute defining a separate offense.

The constitutionality of the murder statute was upheld by the Texas Court of Criminal Appeals as early as 1928. See *Davis v. State,* 10 S.W.2d 116, and *Crutchfield v. State,* 10 S.W.2d 119.

In the latter case Judge Lattimore, speaking for the Court, said:

> ". . . Referring to chapter 274, Gen. & Sp. Acts Reg. Sess. 40th Leg., we note that every voluntary killing of a human being, if there be no circumstances reducing the offense to negligent homicide, or excusing or justifying such killing, would be murder. The former law was identical, save that it used the expression 'with malice aforethought,' where now appears in the statute the word 'voluntarily,' and it also included manslaughter in the inferior offenses referred to in the latter part of the article. We perceive no reason for holding that the law-making body, which put 'malice aforethought' into its definition of murder at a former time, might not now take it out and substitute for said expression the word 'voluntarily.' With the wisdom of the change we have nothing to do, but are fully of opinion that it was within the power of the Legislature, and that there appears in our Constitution no such limitation upon said power as would be transgressed by making such change.
>
> "Under the new law, every voluntary killing, unattended by circumstances which reduce the offense to negligent homicide, or which excuse or justify the act, is murder, and punishable as set out in the statutes. Aside from the repealing part of chapter 274, supra, it adds two procedure provisions to our murder statute—one providing that all relevant facts as to the previous relations between the accused and the deceased, also those facts going to show the condition of the mind of the accused, as well as these facts relevant to the

guilt or innocence of the accused, should be held inadmissible; the other making it the duty of the trial court in every murder case to define malice aforethought and to apply that term by appropriate charge to the facts of the case, as well as to instruct the jury that they cannot assess the punishment at more than five years in the penitentiary, unless they believe from the evidence before them that the accused acted with malice aforethought in committing the homicide."

In 1931, some four years after the act amending Arts. 1256 and 1257 and enacting Art. 1257-a and including Sec. 3-a, and after these opinions had been handed down, the Legislature amended Sec. 3-a of said Act (Acts 1931, p. 94) by adding Section 3-b which reads:

"In all cases tried under the provisions of this Act it shall be the duty of the Court where the facts present the issue of murder without malice, to instruct the jury that murder without malice is a volunary homicide committed without justification or excuse under the immediate influence of a sudden passion arising from an adequate cause, by which it is meant such cause as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection, and in appropriate terms in the charge to apply the law to the facts as developed from the evidence."

This statute has been designated by the publishers and now appears as Art. 1257c, V.A.P.C.

At the same time the Legislature amended Sec. 3-a of the 1927 Act it amended Art 1160 P.C. defining an assault with intent to murder (Acts 1933, p. 95) which prior to the amendment read:

"If any person shall assault another with intent to murder, he shall be confined in the penitentiary not less than two nor more than 15 years; if the assault be made with a bowie-knife or dagger or in disguise, or by laying in wait, or by shooting into a private residence, the punishment shall be double."

As amended, this statute then appeared as Art. 1160, V.A.P.C.,* and read:

"If any person shall assault another with intent to murder, he shall be confined in the penitentiary not less than two nor more than fifteen years; provided that if the jury find that the assault was committed without malice, the penalty assessed shall be not less than one nor more than three years confinement in the penitentiary; if the assault be made with a bowie-knife or dagger, or in disguise, or by laying in wait, or by shooting into a private residence, the punishment shall be double.

"Sec. 2. Upon the trial of any person for assault with intent to murder, the Court, in its charge to the jury, shall define malice aforethought and in a proper case murder without malice, and instruct the jury touching the application of the law to the facts."

It was this 1933 statute which was construed in *Welcome v. State,* 438 S.W.2d 99, and the prior opinions which were overruled in *Welcome.*

Whether the construction in *Welcome* was correct or not, it is certain that the prior opinions construing the murder statute were not overruled.

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*By amendment in 1961, the maximum punishment was raised from fifteen (15) to twenty-five (25) years (Acts, 57th Leg., p. 706, Ch. 311, Sec. 1).

It was the 1927 statute, not the 1933 amendment (Art. 1257c) which added Section 3b (Art. 1257b) which has been construed by the Texas Court of Criminal Appeals uniformly and without dissent as providing one offense.

Cases holding that murder under the Texas Statute does not embrace two offenses and there is but one offense that is murder include the following:

Pruitt v. State	25 S.W.2d 870
Herrera v. State	36 S.W.2d 515
Ex Parte Conway	37 S.W.2d 1017
Morgan v. State	49 S.W.2d 788
Chappell v. State	61 S.W.2d 842
Stephens v. State	68 S.W.2d 181
Hill v. State	69 S.W.2d 409
Joubert v. State	124 S.W.2d 368
Beckham v. State	148 S.W.2d 1104
Mosley v. State	196 S.W.2d 822
Lovelady v. State	198 S.W.2d 570
Lopez v. State	286 S.W.2d 424

See also 29 Tex.Jur.2d 83, 84.

The uniform holding of the Texas Court of Criminal Appeals, the court of last resort in criminal matters, was aptly stated by Judge Lloyd Davidson in *Lopez v. State,* supra:

"Under our present murder statute, there is but one offense, and that is murder. Chappell v. State, 124 Tex.Cr.R. 187, 61 S.W.2d 842; Joubert v. State, 136 Tex.Cr.R. 219, 124 S.W.2d 368.

"Indeed, in the Joubert case it was held that where one is convicted of murder without malice and the conviction is set aside he may be convicted of murder with malice upon a subsequent trial.

"The aforementioned holding demonstrates the fact that the question of malice relates only to penalty and is not a part of the offense.

"The jury having found appellant guilty of murder, their verdict is sufficient."

The holding in the opinion of the Fifth Circuit in Galloway: "There can be little doubt that murder with malice and murder without malice are separate and distinct offenses under Texas law," is directly contrary to the uniform unanimous opinions of the Texas Court of Criminal Appeals. Should such opinion stand and become binding upon the Texas courts, serious questions as to whether Texas has a valid statute defining the offense of murder with malice will arise.

There is nothing in the federal Constitution to prevent the people of a state from enacting, if they see fit, one murder statute with varying punishments based on a quantum of malice. The construction by the courts of a state of its statutes is, and should be, binding on the federal courts. It may be that the highest state court may misconstrue its statutes but the federal courts are not at liberty to set aside its judgments. The state courts are the final arbiters as to such questions.

Article IV., Section 4 of the Constitution of the United States provides:

"Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government. . . ."

The power to enact statutes is one of the essential elements of a Republican Form of Government. Whenever the highest tribunal of a state holds that under the true construction of its statutes there is but one mur-

der statute, the federal courts can neither deny the correctness of this construction nor repudiate its binding force.

In *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, this Court established a doctrine which has been the law of the land from 1938 until today. Mr. Justice Brandeis speaking for a majority of the Court set forth the rule:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. And no clause in the Constitution purports to confer such a power upon the federal courts. . . ."

The rule established by *Galloway* and the present case is an unconstitutional assumption of powers by the Courts of the United States and if permitted to stand, in effect, overrules *Erie v. Thompson,* supra.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Petition for Writ of Certiorari were served on the attorney for the Respondent by depositing same in the United States Mail, postage prepaid, certified mail, on this the —— day of April, 1970, addressed as follows: Mr. Charles W. Tessmer, Attorney at Law, 706 Main Street, Suite 400, Dallas, Texas 75202.

GILBERT J. PENA
Assistant Attorney General

APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 28246

EX PARTE: LEPORT WALTON,
Plaintiff-Appellant,

v.

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

(January 20, 1970)

Before GEWIN, COLEMAN, and DYER, Circuit Judges.

PER CURIAM: On June 23, 1969, the double jeopardy prohibition of the Fifth Amendment to the United States Constitution was declared applicable to the various states, *Benton v. Maryland,* — U.S. —, 89 S.Ct. 2056, 23 L.Ed.2d 707.

This is an appeal from the denial of habeas corpus to a Texas state prisoner. Walton was first indicted for murder in 1962. A jury then convicted him of murder without malice and assessed his punishment at imprisonment for five years. This conviction was reversed. He was again tried in July, 1965, with the result that he was found guilty of murder with malice aforethought and sentenced to imprisonment for fifty years.

The question raised by the appeal is whether this second conviction constituted double jeopardy and thus retroactively falls within the interdiction of *Benton v. Maryland, supra.*

On January 6, 1970, this Court, in another case, *Galloway v. Beto,* [No. 27,461, — F.2d —] answered the question in the affirmative.

Therefore, the judgment of the District Court is reversed and the cause remanded for further proceedings not inconsistent with the rule announced in *Galloway, supra.*

REVERSED and REMANDED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

NO. 28246

D. C. Docket No. CA 4989
(Formerly 68-H-1042)
EX PARTE: LEPORT WALTON
Plaintiff-Appellant,

v.

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS.

Before GEWIN, COLEMAN, and DYER,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

It is further ordered that defendant-appellee pay the costs on appeal in this Court.

January 20, 1970

Issued as Mandate:

APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 27461

ROBERT CHESTER GALLOWAY,
Plaintiff-Appellee,

v.

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

(January 6, 1970)

Before THORNBERRY, GODBOLD and MORGAN, Circuit Judges.

GODBOLD, Circuit Judge: Galloway was charged in Texas state court with murder, including both murder with malice and murder without malice, as a result of a nightclub slaying. The jury brought in a verdict of guilty of murder without malice, which carries a maximum statutory penalty of five years in Texas.

The verdict was silent as to the charge of murder with malice.

Galloway requested, in accordance with Texas procedure,[1] that his sentence be fixed by the jury which (2) (b) (1965).

had found him guilty. After several hours of deliberation the jury, still unable to agree on punishment, was discharged by the trial judge with the written consent of Galloway's attorney, and a mistrial was declared.[2]

Upon retrial under the original indictment, Galloway was convicted of murder with malice and sentenced to twenty years in prison. His petition for a writ of habeas corpus was granted by the District Court on the ground that due process prevented his being retried for murder with malice. Subsequent to the District Court's decision, the Supreme Court expanded the protections of the Fourteenth Amendment's due process claue by holding that state convictions "must be judged . . . under this Court's interpretations of the Fifth Amendment double jeopardy provision." *Benton v. Maryland*, —— U.S. ——, ——, 23 L.Ed.2d 707, 717 (1969). We hold, as have our brethren in the Tenth Circuit,[3] that *Benton* is to be applied retroactively to retrials held before that opinion was handed down, and further that under the circumstances of this case Galloway was placed twice in jeopardy.

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[1] 3 Vernon's Texas Code of Criminal Procedure Art. 37.07

[2] Under the provisions of 3 Vernon's Texas Code of Criminal Procedure Art. 37.07 (2) (d) (1965), providing that in such an instance "no jeopardy shall attach."

[3] Booker v. Phillips, — F.2d — (1969). *Contra*, Spidle v. State, — S.W. — (Mo.S.Ct. 1969).

The Supreme Court has set up the following guideposts for determining whether or not its decisions on criminal procedure are to be given retroactive effect:

> (a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards and (c) the effect on the administration of justice of a retroactive application of the new standards.

Stovall v. Denno, 388 U.S. 293, 297, 18 L.Ed.2d 1199, 1203 (1967).

By far the most important of these facts is the purpose of the new rule. *Desist v. United States,* —— U.S. ——, 22 L.Ed.2d 248, 256 (1969); *Allison v. New Jersey,* —— F.2d —— (3d Cir. 1969); *United States v. Lucia,* —— F.2d —— (Nos. 26316, 26317, 5th Cir., Sept. 17, 1969). Exclusionary rules aimed at deterring unlawful police practices have generally been made prospective only. *Linkletter v. Walker,* 381 U.S. 618, 14 L.Ed.2d 601 (1965), denying retroactive effect to *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed.2d 1081 (1961); *Johnson v. New Jersey,* 384 U.S. 719, 16 L.Ed.2d 882 (1966), giving only prospective application to *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed.2d 694 (1966). In those cases retroactive application could have done little to further the Court's aim of deterrence. But where violations of the defendant's constitutional rights have gone to the fairness of the trial itself, and especially where those violations have been correctible on a new trial, the Supreme Court has applied its rules retroactively. Thus the right of the indigent to appointed counsel enunciated in *Gideon v. Wainwright,* 372 U.S. 335, 9 L.Ed.2d 799 (1963) has been granted retroactively, and the expanded right of confrontation of *Bru-*

ton v. United States, 391 U.S. 123, 20 L.Ed.2d 476 (1968) was applied retroactively in *Roberts v. Russell,* 392 U.S. 293, 20 L.Ed.2d 1100 (1968).

In *Linkletter, supra,* the Supreme Court first applied the test of whether the new rule went to the "fairness of the trial." Here we are concerned with whether the defendant should be on trial at all. We conclude that the purpose of the *Benton* rule warrants retroactive application.

Nor do the second and third factors persuade us otherwise. The "reliance by law enforcement authorities" in the second factor has generally been construed to mean reliance on prior decisions by police in their out-of-court investigations. *Johnson v. New Jersey, supra; Desist v. United States, supra; but see DeStefano v. Woods,* 392 U.S. 631, 20 L.Ed.2d 1308 (1968). The case at bar is entirely unrelated to police practices tailored to past decisions of the Supreme Court.

Reliance by state courts is important in the third factor, the impact of retroactivity on the administration of justice in the states. Impact may be measured by two criteria—number of convictions which would have to be reopened, which depends on how frequently the states have relied on the old standard, and other burdens on the state courts. Reversals for failure to comply with *Benton* standards should not be frequent, since "every State incorporates some form of the prohibition in its constitution or common law." *Benton, supra,* —— U.S. at ——, 23 L.Ed.2d at 716. Furthermore, the viability of *Palko v. Connecticut,* 302 U.S. 319, 82 L.Ed. 288, overruled by *Benton,* has been in doubt at least since *United States ex rel. Hetenyi v.*

Wilkins, 348 F.2d 844 (2d Cir. 1965) and the Supreme Court's avoidance of the incorporation question in *Cichos v. Indiana,* 385 U.S. 76, 17 L.Ed.2d 175 (1966). Cases in which the states justifiably relied on *Palko* can be only very few. Retroactive application of *Benton* would not create the other administrative complexities contemplated in *Desist, supra,* since the determination of the factual basis of a double jeopardy claim should be a relatively simple matter.

Even if these latter two factors cut more strongly than they do in favor of prospective application only, we should not deem them controlling. *Desist, supra,* —— U.S. at ——, 22 L.Ed.2d at 256 (1969). "The fundamental nature of the guarantee against double jeopardy can hardly be doubted . . . it is 'clearly fundamental to the American scheme of justice.' " *Benton, supra,* —— U.S. at ——, 23 L.Ed.2d at 716-17 (1969). This guarantee protects Galloway even though his retrial was held prior to *Benton.*

Jeopardy, for purposes of the federal rule, may so attach as to prevent a second trial even after a mistrial. Any other rule would allow prosecutors to harass defendants through repeated trials or to move for a mistrial and seek a jury more favorable to the government. *Downum v. United States,* 372 U.S. 734, 10 L.Ed. 2d 100 (1963). Exceptions have been created in cases of "imperious necessity" or where "the ends of public justice would otherwise be defeated," *Wade v. Hunter,* 336 U.S. 684, 93 L.Ed. 974 (1949) (absence of witnesses from war zone); *Simmons v. United States,* 142 U.S. 148, 35 L.Ed. 968 (1891) (juror bias disclosed after voir dire); *United States v. Perez,* 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824) (hung jury).

The District of Columbia Circuit, under peculiar circumstances, has upheld the declaration of a mistrial and subsequent retrial after the jury had rendered its verdict. In *Crawford v. United States,* 285 F.2d 661 (D.C.Cir. 1960), defendant was found guilty on both counts in his indictment, but some jurors informed the judge after the jury had been formally dismissed in the case that they had not had a chance to vote on one of the counts. The trial judge set aside the verdict and ordered a new trial. The Court of Appeals affirmed defendant's second conviction on both counts.

Crawford, like all the other mistrial-double jeopardy cases, turns on its special facts. 285 F.2d at 662, 663; *Downum, supra,* 372 U.S. at 736, 10 L.Ed.2d at 102-03 (1963). A mistrial may be followed by retrial "only in very extraordinary and striking circumstances." 372 U.S. at 736, 10 L.Ed.2d at 103. In *Crawford,* those exceptional circumstances were that the jury had brought in a presumptively valid verdict of guilty as charged. Any prejudice to the defendant on retrial would be minimal, since he could be convicted of no greater offense than he had been convicted of on his first trial. In the case before us, however, the first jury had refused to convict of murder with malice. The retrial subjected him to a second prosecution for an offense of which he had been impliedly acquitted.'

'No other procedural barriers stand in the way of Galloway's assertion of his double jeopardy defense. Defense counsel's written consent to the mistrial does not amount to a waiver of the double jeopardy plea, since the protections of *Benton* had not yet been announced. A waiver of a constitutional right is ineffective unless made knowingly. Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461 (1938). Defendant's failure to comply with Texas procedure for raising a plea of double jeopardy did not bar his assertion of that federal de-

The rule that an implied acquittal bars reprosecution was enunciated in *Green v. United States,* 355 U.S. 184, 2 L.Ed.2d 199 (1957). Defendant in that case had been indicted for both murder in the first degree and murder in the second degree. The jury convicted him only of the latter. The Supreme Court held that the jury's failure to address itself to murder in the first degree amounted to a verdict of not guilty on that charge.

Defendant Galloway was impliedly acquitted of murder with malice by the jury's silence unless it can be established that the elements of that offense are identical to those of murder without malice, the offense of which he was convicted. The state of Texas calls our attention to 2A Vernon's Texas Penal Code Art. 1256,

> Whoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distingushed from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing,

pointing out that this definition nowhere differentiates between murder with malice and murder without malice. Article 1257a allows the defendant to introduce evidence of lack of malice, and Article 1257b provides for a five-year ceiling on imprisonment for murder without malice. Subsequent to the enactment of the above statute in repeal of the former provisions providing for degrees of murder, the Texas state courts

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fense. Galloway sufficiently raised that issue by his pre-trial motion to strike that part of the indictment which charged him with murder with malice and by his submission of affidavits relating the circumstances of the first trial.

have held that the prosecution's case is simply for murder, rather than for either murder with malice or murder without malice, so that a conviction of only murder without malice will not bar a retrial for murder with malice if the case is reversed on appeal. *Beckham v. State,* 148 S.W.2d 1104 (Ct. Crim. App. Tex. 1941).

The state urges that Texas' interpretation of its own statute is binding upon us by virtue of *Chicos v. Indiana,* 385 U.S. 76, 17 L.Ed.2d 175 (1966). The Supreme Court in that case held that defendant had not been twice placed in jeopardy because the offence of which he was convicted and that on which the jury was silent were virtually identical. Chicos was convicted of reckless homicide, carrying a maximum penalty of five years' imprisonment, and the jury was silent as to the charge of vehicular homicide, which carries a possible sentence of 21 years. The Supreme Court, noting that "[b]oth crimes require proof of the same elements to sustain a conviction under Indiana law" and that the general practice was to submit both issues to the jury with instructions to return a verdict of guilty as to no more than one, agreed with the Indiana Supreme Court that the practical effect of the submission of both charges was nothing more than to give the jury discretion in fixing a higher or lower penalty. Under the circumstances, resubmission of the issue of involuntary manslaughter on defendant's second trial did not subject him once again to possible conviction of a crime of which he had been acquitted, but merely allowed the jury to fix a higher penalty for a crime of which he had been properly convicted. The Supreme Court's approach did not take the Indiana state decisions as controlling, but merely looked

to them for guidance as to the relationship between the crimes charged.

We are bound not by the pronouncements of the Texas courts on the double jeopardy effect of a retrial for murder with malice, but by Texas law on the relationship of the two offenses as it affects the implied acquittal doctrine. One recent case severely undercuts the state courts' identity doctrine as to the murder statute. In *Welcome v. State,* 438 S.W.2d 99 (Ct. Crim. App. Tex. 1969), Judge Onion held that a conviction for the lesser included offense of assault with intent to murder without malice would bar a prosecution on retrial after appeal for assault with intent to murder with malice. He distinguished the murder statute* on the grounds that the legislature had manifested its intent to create two different offenses called "assault" by providing separate maximum and minimum sentences for each offense, and by limiting a double penalty provision to convictions for murder without malice. 438 S.W.2d at 105.

The rule of *Chicos* is that such differing penalty provisions are not controlling as to whether a defendant has been twice placed in jeopardy. Our inquiry should be directed instead to whether the elements of the crimes charged are the same. There can be little doubt that murder with malice and murder without malice are separate and distinct offenses under Texas law. Once the defendant satisfies his burden of going for-

*The state calls our attention to Walton v. Beto, — F.Supp. — (Civ. No. 4989, E.D. Tex., June 5, 1969), which relied on *Welcome* in upholding a conviction similar to Galloway's. The district court in *Walton* did not have the benefit of *Benton,* which later that month applied federal double jeopardy standards to state prosecutions.

ward with evidence of lack of malice, the state must prove beyond a reasonable doubt that defendant acted with malice aforethought. *McNeil v. State,* 154 S.W.2d 653 (Ct. Crim. App. Tex. 1941); *Swilley v. State,* 25 S.W.2d 1098 (Ct. Crim. App. Tex. 1929). Should the state prove every other element in its case, if it fails this burden it has proved murder without malice. If it carries this burden, it has proved a new element and in effect a new offense, that of murder with malice. The state may not have the opportunity once again to prove that element once it has gone to the jury and failed. Galloway's retrial for murder with malice placed him twice in jeopardy in violation of the Fourteenth Amendment.

The judgment of the District Court is AFFIRMED.

APPENDIX "D"

DEFINING MURDER AND REPEALING THE MANSLAUGHTER STATUTE—EVIDENCE IN MURDER CASES.

S. B. No. 168.] CHAPTER 274.

An Act amending Articles 1256 and 1257 of the Penal Code of 1925, so as to properly define murder, and fixing the punishment for murder; inserting in the Penal Code a new article numbered 1257-a relating to what may be proved, and considered by the jury, in determining the punishment to be assessed for murder; repeating Chapter 15 of Title 15 of the Penal Code of 1925, relating to manslaughter, and all other laws in conflict with this Act, repealing Chapter 18 of Title 15 of the Penal Code of 1925; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Articles 1256 and 1257 of the Penal Code of 1925, are each hereby amended so as to hereafter read as follows:

"Article 1256. Whoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing."

"Article 1257. The punishment for murder shall be death or confinement in the penitentiary for life, or for any term of years not less than two."

SEC. 2. There is hereby enacted Article 1257-a of the Penal Code of this State which shall read as follows:

"Article 1257-a. In all prosecutions for felonious homicide the State or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the homicide, which may be considered by the jury in determining the punishment to be assessed. Provided, however, that in all convictions under this Act and where the punishment assessed by the Jury does not exceed five years, the Defendant shall have the benefits of the suspended sentence act."

SEC. 3. Chapter 15 of Title 15 of the Penal Code of 1925, relating to manslaughter, and all other laws in conflict herewith, are hereby repealed. This Act shall not be construed as repealing Chapter 14 of Title 15 of the Penal Code of this State relating to negligent homicide. Chapter 18 of Title 15 of the Penal Code of 1925 is hereby repealed.

SEC. 3-a. In all cases tried under the provisions of this Act, it shall be the duty of the Court to define "malice aforethought" and shall apply that term by appropriate charge to the facts in the case and shall instruct the Jury that unless from all the facts and circumstances in evidence the Jury believes the Defendant was prompted and acted with his malice aforethought, they cannot assess the punishment at a period longer than five years.

SEC. 4. The fact that it is difficult to adequately enforce the law relating to homicide under the present statutes, and the fact that this law will define murder

so as to enable the juries to more intelligently render verdicts in homicide cases doing away with the necessity of complicated and confusing charges to the jury as to manslaughter, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each House be suspended, and said rule is hereby suspended, and that this Act shall take effect and be in force from and after its passage, and it is so enacted.